Petition

Office - Supreme Court, U.S.
FILED
JAN 6 1982

81-1260

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH ALLNUTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH M. LaTONA, Esq.
Attorney for Petitioner
300 Statler Office Building
Buffalo, New York 14202
Telephone: (716) 856-2183

CONDON, SEDITA, LaTONA,
PERSONIUS AND KLINGENSMITH, P.C.
Of Counsel

QUESTIONS PRESENTED

1. Whether a federal prosecutor may attempt to suppress evidence sought by defense trial subpoena when the prosecutor knows that the evidence will prove that the key prosecution witness has perjured himself at trial as to the extent of his involvement in criminal activity for which he has received immunity?

2. Whether a district judge may quash defense trial subpoenas when he knows that the proffered evidence will prove that the key prosecution witness has committed perjury and made prior inconsistent statements as to his involvement in criminal activity for which the witness has received immunity?

3. Whether a district court may persist in its decision to summarily quash defense trial subpoenas which sought undisclosed *Brady* material from federal law enforcement agencies when the court's decision was based solely upon the unsworn oral representations of a federal prosecutor which were contradicted by a sworn affidavit?

4. May a district court intervene and impeach the key prosecution witness as to testimony which is favorable to the accused in violation of Federal Evidence Rule 607?

5. May a district court gratuitously undermine the impact of critical admissions by the key prosecution witness which were favorable to the accused?

6. Whether the district court's imbalanced marshaling of the evidence and erroneous jury instructions deprived Petitioner of a fair trial?

7. May a search warrant be issued absent compliance with Aguilar-Spinelli and in the absence of probabie cause to

believe that the items to be seized are at the location to be searched?

8. Whether Petitioner's Speedy Trial Rights were violated?

TABLE OF CONTENTS

	Page
Questions Presented	*i*
Table of Authorities	*iv*
Opinion Below	*vi*
Jurisdiction	*vii*
Constitutional Provisions Involved	*viii*
Statutes and Rules Involved	*ix*
Statement of the Case	1
Reasons for Granting the Writ	9
Conclusion	12

APPENDIX A

Second Circuit Opinion	A-1
Second Circuit Order Denying a Re-hearing	A-4

APPENDIX B

Statutes Involved	B-1

TABLE OF AUTHORITIES

Cases:	Page
Aguilar v. Texas, 378 US 108 (1964)	10
Barker v. Wingo, 407 US 514 (1972)	12
Chambers v. Mississippi, 410 US 284 (1973)	9
Giglio v. United States, 405 US 150 (1972)	9
Holland v. United States, 348 US 121 (1954)	10
Napue v. Illinois, 360 US 264 (1959)	9
Quercia v. United States, 289 US 466 (1933)	10
Spinelli v. United States, 393 US 410 (1969)	10
Taylor v. Kentucky, 436 US 478 (1978)	10
Washington v. Texas, 388 US 14 (1967)	9
Zurcher v. Stanford Daily, 436 US 547 (1978)	10
United States v. Agurs, 427 US 97	9
United States v. Daniels, 572 F. 2d 535 (1979)	10
United States v. Manning, 618 F. 2d 45 (8th Cir., 1980)	10
United States v. Nixon, 418 US 683 (1974)	9, 10

Other Authorities:	
Fourth Amendment, United States Constitution	*viii*
Fifth Amendment, United States Constitution	*viii*
Sixth Amendment, United States Constitution	*viii*, 9
18 U.S.C. §2	*vii, ix*
18 U.S.C. §3161	*ii, ix*, 3, 11
18 U.S.C. §3162	*ix*

Page

18 U.S.C. §3163 ..... *ix*

21 U.S.C. §841(a)(1) ..... *vii, ix*

21 U.S.C. §846 ..... *vii, ix,* 1

28 U.S.C. §1254(1) ..... *vii*

28 U.S.C. Federal Rule 607 ..... *ix*

Petitioner, KENNETH ALLNUTT, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 15, 1981.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, dated September 15, 1981, is reprinted in the Appendix, infra, at page A-1 et seq.

JURISDICTION

Following a jury trial before the HONORABLE HAROLD P. BURKE of the Western District of New York, the Petitioner was found guilty on February 2, 1981 on one count of conspiring to distribute cocaine and of two substantive counts of cocaine distribution. 21 U.S.C. §841(a) (1), §846; 18 U.S.C. §2. On April 13, 1981 the Petitioner was sentenced by Judge Burke to three concurrent prison terms of one year and one day.

The United States Court of Appeals for the Second Circuit affirmed the judgments on September 15, 1981. On November 9, 1981 the Second Circuit denied Petitioner's application for re-hearing en banc. That order is reprinted in the Appendix, infra, at page A-4.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V, which states that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, which mandates that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATUTES AND RULES INVOLVED

Federal Rules of Evidence [28 U.S.C.], which provides in pertinent part:

Rule 607 Who May Impeach

> "The credibility of a witness may be attacked by any party, including the party calling him."

Title 21, United States Code, Sections 841 and 846, as well as Title 18 United States Code, Section 2, because of their limited applicability to this petition, are reprinted in pertinent part in Appendix B, infra, at B-1 et seq.

The pertinent provisions of the Speedy Trial Act, 18 United States Code, Sections 3161, 3162 and 3163 are reprinted in Appendix B, infra, at B-1 et seq.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

KENNETH ALLNUTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF FACTS

ALBERT TANTALO, and two others, were charged in a one count Indictment filed in the Western District of New York on October 31, 1979. They were accused of conspiring to distribute cocaine in violation of Title 21 U.S.C. §846 *[10].

In November, 1979 Albert Tantalo was arrested by federal agents. He agreed to cooperate with the authorities. The Government agreed that any information or testimony acquired from Tantalo would not be used against him [27-28; 172-174]. On December 19, 1979, Tantalo testified before a federal grand jury in Rochester, New York [172, 264]. He was

*[ ] refers to pages of Appendix, filed with the United States Court of Appeals for the Second Circuit.

arraigned on the original Indictment on February 22, 1980 [Record].

On January 25, 1980, Drug Enforcement Administration (D.E.A.) Agent Joseph Solpietro obtained and executed a warrant to search a safe deposit box at a bank in Honeoye, New York. The items to be seized were cocaine, dilutants and sums of money [11-18]. Petitioner was authorized to enter the box under the name "Kenneth Jones." At the time he was living with the lessee of the box, Jeanne Jones. Petitioner and Ms. Jones were married in February, 1980 [337-339].

During the search, no cocaine or any dilutant substance was discovered [12-14]. Approximately $67,000 in cash, various documents and certain personal papers were seized and introduced by the Government at trial [139-143].

On March 5, 1980 a superseding six count Indictment was sealed and filed. Petitioner, Albert Tantalo and four others were charged with conspiring to distribute cocaine. Petitioner was also charged with two substantive counts of cocaine distribution. Tantalo was a named co-defendant in one of those counts [1-3]. The superseding Indictment was unsealed at Petitioner's April 14, 1980 arraignment [5].

On July 8, 1980, the Government, for the first time announced its readiness for trial and moved to set a trial date [19]. On July 14, 1980, a trial date of December 1, 1980, was scheduled [5].

On October 6, 1980, the Government moved to sever Petitioner and to set a new date for his trial [5]. This motion was allegedly prompted by Albert Tantalo's rejection of a prosecution plea offer. The Government asserted that Tantalo's prospective testimony against Petitioner was "required" [26-29].

Petitioner filed an omnibus motion on October 9, 1980 [6]. He moved to suppress the contents of the safe deposit box and

for dismissal of the Indictment under the Speedy Trial Act [31, 35-40, 42-45].

In its October 20th reply to Petitioner's dismissal motion, the Government asserted that Tantalo was unavailable under 18 U.S.C. §3161(h) (3) [6, 47]. On October 27, 1980, Petitioner filed a supplemental motion and a response to the prosecution severance motion [6]. These pleadings accurately emphasized the Government's failure to demonstrate Tantalo's "absence" or "unavailability" under the Speedy Trial Act [55, 63-64]. Petitioner's motions were submitted for decision on October 27, 1980 [6]. On November 10, 1980, the severance issue was submitted by all defendants except Tantalo [6].

On December 23, 1980, the Government moved for an order compelling Petitioner to furnish handwriting exemplars. The motion was returnable on January 12, 1981 [6]. Petitioner voluntarily furnished the exemplars on January 12th [75, 325-326].

The prosecution severance motion was granted on December 31, 1980 [77]. Petitioner's suppression and dismissal motions were denied in an order dated January 22, 1981 [78].

In January, 1981, Tantalo pleaded guilty to a misdemeanor charge of cocaine possession [172, 227]. Prior to testifying against Petitioner, Tantalo testified as a prosecution witness against Carl Scacchetti. During the Scacchetti trial, Tantalo claimed that he had ceased all drug trafficking activity in October, 1979 [88].

The defense served various trial subpoenas on law enforcement agencies and personnel. The F.B.I. and D.E.A. were subpoenaed to produce telephone intercepts and other documentation concerning Tantalo [86, 87]. Former County Sheriff William Lombard was subpoenaed. The defense sought production of Gary Haak, a federally protected witness [99-102, 292].

The Government moved to quash the defense subpoenas and to exclude any testimony from Haak [80-82, 99-102]. Argument on the motions to quash the F.B.I and D.E.A. subpoenas was had on January 27, 1981, immediately prior to jury selection [107-117]. During argument, defense counsel stated that he was seeking proof that Tantalo had been distributing drugs in 1980 [109-110].

The prosecutor represented that the F.B.I. and D.E.A. had no knowledge about Tantalo's alleged drug-related activities during 1980 [109, 113-115]. At no time did the prosecutor produce an affidavit or other evidence from either agency disclaiming such knowledge. The prosecutor opined that the defense was actually seeking information about "other investigations" [108, 112-115].

Defense counsel requested that the Court review the subpoenaed material *in camera* [109]. Except for a New York State Police continuation sheet, the subpoenaed items were not given to the Court. The Court granted the Government motion to quash on January 28, 1981 [98].

Albert Tantalo testified on the morning of January 28th. During his direct examination, the Government elicited testimony that Tantalo's drug trafficking terminated in late 1979 [175]. Tantalo reiterated that testimony during cross-examination and denied handling drugs in December, 1979 [231-232].

On Tantalo's direct examination, the Government elicited testimony concerning his immunized involvement in a stolen car operation [173-174]. During cross-examination, Tantalo limited this involvement to no more than ten vehicles [229]. He testified that he would buy an automobile and strip the parts for resale. Tantalo conceded that this enabled the vehicle's owner to file a false theft claim and collect insurance proceeds [228-229].

On the afternoon of January 28, 1981, argument was had on the Government motions to quash the Lombard subpoena and to exclude the Haak testimony [288-300]. During argument, defense counsel was directed to disclose the purpose for which these two witnesses were called. Counsel informed the Court and the prosecutor that the witnesses would testify that Tantalo had illegally disposed of hundreds of vehicles, that he had made prior inconsistent statements and that he had lied about that activity at Petitioner's trial [294-299]. Despite being made aware of this information, the prosecutor persisted in seeking exclusion of this testimony. The Court granted the Government's motion to quash later that day [103-104].

On the day the Government rested its case, defense counsel acquired and submitted the affidavit of Rick Loveland [105-106]. Loveland worked for Tantalo from 1977 through 1980 [247-248]. During his employ, Loveland acquired personal knowledge that Tantalo stripped parts from two or three vehicles per week and that Tantalo re-sold the parts. The vehicles were either stolen or involved in fraudulent insurance claims.

Loveland also swore that Tantalo was involved in the possession and sale of large quantities of marijuana and cocaine in December, 1979, and January, 1980. Loveland stated that this information had been furnished to the F.B.I. [105-106].

The Loveland affidavit was submitted in support of a defense motion for acquittal based upon the Government's suppression of *Brady* material [330-331]. The Court summarily denied the motion without ever resolving the factual conflict between the Loveland affidavit and the prosecutor's oral representations during argument on the motion to quash the F.B.I. and D.E.A. subpoenas [331].

THE TRIAL

The testimony of Albert Tantalo was crucial to the Government's case. The only directly probative information acquired by independent law enforcement investigation was the existence of three telephone calls received at Petitioner's residence on October 1, 1979.

With respect to one of the substantive counts on which Petitioner was convicted, the critical issue was the identity of the person that Tantalo had spoken to on the telephone. Petitioner and Tantalo had engaged in legitimate business dealings involving auto repairs. This telephone conversation related to and immediately preceded the delivery of four ounces of cocaine to Tantalo.

On direct examination, Tantalo testified that he believed this person was Petitioner [188]. During cross-examination, Tantalo testified that he had a "very big doubt" about whether he had spoken to Petitioner or another person who frequented Petitioner's home [216-217].

On re-direct, the prosecutor read a portion of Tantalo's grand jury testimony which included the following:

> "Question: On October 1st did you recognize his voice when you were talking to him?
>
> "Answer: Yes. I mean — I'm not — I speak to him a lot, but Ken's voice is not something very easy to recognize because he changes — but I knew it was him.
>
> "Question: You knew it was him on October 1st?
>
> "Answer: Yes. I'm sure it was."

On further re-direct, Tantalo testified that many times he had expressed doubts about who he had spoken to [267]. Tantalo testified that he had doubts during his grand jury testimony which was supported by the pauses in that testimony [268-269]. Tantalo stated that his doubts became more "real" and "really hit . . . hard" the preceding evening when he spoke on the

telephone with his secretary and thought it was his wife [217-218, 267]. During re-cross, Tantalo stated that he couldn't send Petitioner to jail by saying that it was his voice [277]. The Court immediately interjected

> "Court: Why did you do it then and can't now?
>
> "Witness: Because I am not sure. I have to be sure to do it.
>
> "Court: You were sure when you testified before the grand jury. What has made you change your mind?" [277]

The Court continued its interrogation in an obvious effort to impeach Tantalo [277-283].

The critical issue as to the second substantive count on which Petitioner was convicted related to the nature of a particular substance transferred by Petitioner to Tantalo. On direct examination, Tantalo said he didn't know what the substance was and then volunteered that "it should have been cocaine" [207]. Defense counsel moved to strike the answer and at that point the Court interjected [207-209].

While questioned by the Court, Tantalo testified that he thought it was cocaine but that he never tested the substance or checked it out [207-209]. The Court gratuitously commented

> "[a]ll right. There is much to do about nothing. You got what you thought was cocaine." [209].

Under cross-examination, Tantalo testified that he didn't know whether the substance was cocaine and that there was no way he could identify that substance as being cocaine [212-214].

At no time was the jury told that it should not interpret judicial intervention as any indication of the Court's own opinion.

In marshalling the evidence, the Court adopted the Government's marshalling suggestions on the identification issues

verbatim. Ignoring testimony to the contrary the Court informed the jury that Tantalo's doubt on the voice issue arose the evening before he testified [440, 487]. In rejecting a defense suggestion to the effect that Tantalo didn't know what the substance was but that he believed it to be cocaine, the Court advised the jury that Tantalo couldn't be positive but that he believed the material was cocaine [440, 487-488].

In its requests to charge, the defense sought the following instructions:

1. That mere presence or association with culpable individuals is insufficient to establish that defendant was an aider and abettor [451-452];

2. Concerning circumstantial evidence, an explanation that deductions and conclusions from proven facts should be based upon reason and common sense. Also the principle that the jury must draw the inference of innocence where an act is capable of supporting two opposite interpretations [452-453];

3. The mere presence of large amounts of money by itself was not indicative of criminal conduct. Also that if the jury initially determined that assets were neither suddenly acquired nor unexplained then no inference of criminality could be drawn [453];

4. Regarding reasonable doubt, a statement that if the evidence, as viewed by the jury, reasonably permitted either a conclusion of guilt or of innocence, then the jury should acquit [453-454].

These requests were denied by the Court [458]. Timely objection was taken to the Court's actual charge on these topics with the exception of reasonable doubt [491-492].

REASONS FOR GRANTING THE WRIT

This Court has mandated that a prosecutor must correct the record whenever testimony that the prosecutor knows to be false is elicited from a Government witness. *Napue v. Illinois,* 360 US 264 (1959); *Giglio v. United States,* 405 US 150 (1972). At argument on the motions to quash the Lombard subpoena and exclude Haak's testimony, the prosecutor learned that Albert Tantalo had perjured himself at Petitioner's trial. Significantly, the prosecutor herself had delved into Tantalo's immunized involvement in the stolen vehicle operation during his direct examination.

Unquestionably, the accuracy and truthfulness of Tantalo's testimony were vital elements in the Government case against Petitioner. Had the prosecutor known of Tantalo's deception at the time he testified, she would have been obliged to correct it. *Napue, supra,* at 269; *Giglio, supra,* at 153. The same requirement should be imposed where the accused endeavors to correct the false testimony of a key Government witness by exercising his Sixth Amendment right to compulsory process. *Washington v. Texas,* 388 US 14 (1967); *Chambers v. Mississippi,* 410 US 284 (1973); *United States v. Nixon,* 418 US 683 (1974).

Despite a defense request for an *in camera* review of the subpoenaed F.B.I. and D.E.A. material neither the prosecution nor the Court implemented that request. *United States v. Agurs,* 427 US 97. By actively suppressing this material, the Government may well have concealed evidence of Tantalo's perjury at the Scacchetti trial. The Government may also have knowingly presented perjured testimony during Tantalo's direct examination at Petitioner's trial.

By quashing the agency subpoenas, the trial Court permitted the Government to unilaterally determine that these items were immaterial. The Court compounded its abdication of

responsibility by failing to reconcile the factual conflict between Loveland's sworn affidavit and the prosecutor's oral representations.

In *United States v. Nixon, supra,* this Court observed that

> "[t]o ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or defense." 418 US at 709.

This Court noted as well that the judiciary has a "manifest duty" to effectuate an accused's right to compulsory process. 418 US at 711. It is self-evident that the trial Court failed to fulfill this duty and that the integrity of our judicial system was compromised.

During crucial portions of Tantalo's examination, the trial Court intruded and impeached the witness as to testimony that was favorable to Petitioner. On a separate occasion, the Court gratuitously undermined Tantalo's admission that he did not know the nature of the substance he received from Petitioner.

Federal Evidence Rule 607 authorizes a party, not the Court, to impeach a witness. The Fifth Circuit has held that:

> ". . . when the attorneys are competently conducting their cases, it is improper for the trial judge to question the witnesses" *United States v. Daniels,* 572 F. 2d 535 (1979).

It is respectfully submitted that the trial Court's misconduct in this case virtually compels a reversal of Petitioner's conviction by the exercise of this Court's supervisory power. *Quercia v. United States,* 289 US 466 (1933).

This misconduct was compounded by the unbalanced marshalling and improper rejection of the defense requests to charge.

Petitioner contends that in this case the Court should have delivered a dual inference instruction with respect to cir-

cumstantial evidence and reasonable doubt. The concept that an inference of innocence must be drawn where the proof is capable of supporting two equally reasonable interpretations was crucial for a proper evaluation of the evidence of this case. Uniform application of the dual inference instruction will unquestionably enhance the administration of criminal justice. *Cf. Holland v. United States,* 348 US 121, 139-140 (1954); *Taylor v. Kentucky,* 436 US 478 (1978).

Of similar significance is the requirement that an accused may not be convicted for criminal conduct merely because he associates with culpable individuals. *United States v. Manning,* 618 F. 2d 45 (8th Cir., 1980). In addition, a jury should be instructed that the mere possession of a large amount of cash does not necessarily support the proposition that the funds were generated in an illegal manner.

The search warrant application in this case was based primarily upon confidential hearsay information from two informants. Petitioner contends that the application was insufficient to support a conclusion that the informants were reliable or that their information was acquired in a trustworthy fashion. *Aguilar v. Texas,* 378 US 108 (1964); *Spinelli v. United States,* 393 US 410 (1969).

However, even accepting the accuracy of the assertions set forth in the application, it failed to furnish "reasonable cause to believe" that the items to be seized were at the premises to be searched. *Zurcher v. Stanford Daily,* 436 US 547, 556 (1978).

Petitioner was denied a speedy trial due to the Government's misconduct. A total of 224 non-excludable days elapsed prior to Petitioner's trial. Of that period, 49 days were subsequent to Petitioner's Speedy Trial Act dismissal motion.

Had the Government promptly tried Tantalo on the original indictment, his testimony against Petitioner could easily have been compelled. Instead, the prosecution procured a super-

seding indictment against Petitioner and Tantalo in violation of its immunity agreement with Tantalo.

The Government had known well before the superseding indictment was returned that Tantalo's testimony was essential. Incredibly, the prosecution jointly indicted Petitioner and Tantalo without first obtaining an assurance that Tantalo would plead guilty. The Government's unreadiness was unequivocably admitted in its severance motion wherein it expressly requested a delay of Petitioner's trial.

Petitioner asserted his speedy trial right well before the prosecution was actually ready to proceed. Petitioner was prejudiced by the unreasonable delay and was

> "disadvantaged by restraints on his liberty and by living under a cloud of anxiety . . ." *Barker v. Wingo*, 407 US 514, 533 (1972)

CONCLUSION

For these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

JOSEPH M. LaTONA, Esq.
Attorney for Petitioner
300 Statler Office Building
Buffalo, New York 14202
Telephone: (716) 856-2183

CONDON, SEDITA, LaTONA,
PERSONIUS AND KLINGENSMITH, P.C.
Of Counsel

Appendix

APPENDIX A

APPENDIX A
Second Circuit Opinion

UNITED STATES COURT OF APPEALS

For The

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of September one thousand nine hundred and eighty-one.

Present: HONORABLE J. EDWARD LUMBARD, HONORABLE IRVING R. KAUFMAN, Circuit Judges, HONORABLE LAWRENCE W. PIERCE, District Judge, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

KENNETH ALLNUTT,

Appellant.

81-1156

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. In issuing a search warrant for the safe deposit box at Canandaigua National Bank and Trust Company, Judge Burke was presented with evidence sufficient for him to conclude that the informants were credible and that the information they provided was reliable, thereby establishing probable cause for the warrant. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinelli* v. *United States,* 393 U.S. 410 (1969).

2. Under the Speedy Trial Act, 18 U.S.C. §3161 *et seq.*, appellant had the burden of showing how the time interval between indictment and trial violated the requirements of the Act. Since he never attempted to do so, he waived his claim for dismissal under the Act. 18 U.S.C. §3162. Furthermore, the interval was reasonable and nonprejudicial, and therefore not in violation of the Sixth Amendment to the Constitution. *Baker* v. *Wingo,* 407 U.S. 514 (1972).

3. Viewing the facts in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), it is clear that the jury was presented with sufficient evidence to conclude that appellant criminally distributed cocaine on two separate occasions. *United States* v. *Agueci,* 310 F.2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963).

4. Judge Burke correctly quashed appellant's subpoenas of the Federal Bureau of Investigation and the Drug Enforcement Administration for all documents relating to Tantalo. It is clear that the government disclosed all material required to be disclosed under the Jencks Act, 18 U.S.C. §3500(b) and *Brady* v. *Maryland,* 373 U.S. 83 (1963). It was, moreover, within Judge Burke's discretion to quash the subpoena of Lombard and deny the request to produce Haak. F.R.Evid. 608(b).

5. The trial court's questions were of a form meant to elicit information from the witnesses, *United States* v. *Brandt,* 196 F.2d 653, 655 (2d Cir. 1952) and did not convey bias against the appellant. The court's charge adequately admonished the jury of their sole and ultimate responsibility to find the facts, *United States* v. *Curcio,* 279 F.2d 681, 682 (2d Cir.), *cert. denied,* 364 U.S. 824 (1960). The court's marshalling of the evidence was "fair and unbiased." *United States* v. *Dalli,* 424 F.2d 45, 49 (2d Cir.), *cert. denied,* 400 U.S. 821 (1970). The substance of appellant's requested charge on aiding and abetting and on reasonable doubt was incorporated into the court's charge. Appellant did not have a right to a charge that uses the specific language he prefers. *United States* v. *Jiminez,* 484 F.2d 91 (5th Cir. 1973). The court properly denied defendant's request to charge on the dual inference rule, since this Court has held that a defendant has no right to such a charge. *United States* v. *Turbide,* 558 F.2d 1053 (2d Cir.), *cert. denied,* 434 U.S. 934 (1977). Finally, the court correctly charged that evidence of the possession of large amounts of unexplained cash may be considered circumstantial evidence of participation in a narcotics conspiracy. *United States* v. *Tramunti,* 513 F.2d 1087, 1105 (2d Cir.), *cert. denied,* 423 U.S. 832 (1975).

The mandate shall issue forthwith.

/s/ J. EDWARD LUMBARD,

/s/ IRVING R. KAUFMAN, *Circuit Judges,*

/s/ LAWRENCE W. PIERCE, *District Judge.*

UNITED STATES COURT OF APPEALS
FILED SEP 15 1981
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APENDIX A
Second Circuit Order Denying a Re-hearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of November, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v—

KENNETH ALLNUTT,

Defendant-Appellant.

No. 81-1156

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Kenneth Allnutt,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
Clerk

by Fravier X. Gindbait
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FILED NOV 9 1981
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX B

APPENDIX B
Statutes Involved

21 U.S.C. §841 Prohibited Acts A-Unlawful Acts

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

21 U.S.C. §846 Attempt and Conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. §2 Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

18 U.S.C. §3161 Time Limits and Exclusions

"(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

* * *

"(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained

in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

* * *

"(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

* * *

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * *

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

* * *

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

* * *

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless

the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

* * *

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

18 U.S.C. §3162 Sanctions

"(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section."

18 U.S.C. 3163 Effective dates

"(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980."

Opposition

Office - Supreme Court, U.S.
FILED
MAR 3 1982
L. STEVAS
CLERK

No. 81-1260

In the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH ALLNUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether exculpatory evidence was suppressed.

2. Whether petitioner's motion to suppress evidence obtained during the search of a safe deposit box was properly denied.

3. Whether petitioner was denied a speedy trial.

4. Whether petitioner was denied a fair trial by the court's jury instructions, questioning of a witness, and marshalling of the evidence.

TABLE OF CONTENTS

Page

Opinion 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Texas*, 378 U.S. 108 7

Barker v. *Wingo*, 407 U.S. 514 8

Brady v. *Maryland*, 373 U.S. 83 ..... 4, 5

Illinois v. *Gates*, cert. granted, No. 81-430 (Jan. 11, 1982) 7

Spinelli v. *United States*, 393 U.S. 410 7

Statutes:

Jencks Act, 18 U.S.C. 3500 *et seq.*:

18 U.S.C. 3500 4

18 U.S.C. 3500(b) 4

Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*:

18 U.S.C. 3162(2) 7

18 U.S.C. 3163(c) 7

18 U.S.C. 2 2

21 U.S.C. 841(a)(1) 2

21 U.S.C. 846 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1260

KENNETH ALLNUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The judgment order of the court of appeals (Pet. App. A-1 to A-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1981 (Pet. App. A-3). A petition for rehearing was denied on November 9, 1981 (Pet. App. A-4). The petition for a writ of certiorari was filed on January 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiring to distribute cocaine and to possess it with intent to distribute, in violation of 21 U.S.C. 846, and on two counts of distributing cocaine, in violation

of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of one year and a day's imprisonment on each count. The court of appeals affirmed (Pet. App. A-1 to A-3).

The evidence showed that on October 1, 1979, co-defendant Michael Scott agreed to sell four ounces of cocaine for $6,000 to a local police officer acting as a Drug Enforcement Administration (DEA) undercover agent (Tr. 32). Scott contacted co-defendant Albert Tantalo, who agreed to procure the cocaine (Tr. 132). After a series of calls to petitioner's house (Tr. 133-137), Tantalo spoke to a man he believed was petitioner (Tr. 140) and arranged to purchase a little over three ounces of cocaine for $5,000 (Tr. 138-139). By prearrangement, the cocaine was delivered to Tantalo and Scott by co-defendant Lisa McNamee[1] at a place where petitioner had arranged for McNamee to deliver money to Tantalo in the past (Tr. 139-143).

At a later date in October, Tantalo arranged to make a further purchase of eight ounces of cocaine from petitioner for $15,000. He subsequently picked up, at petitioner's house, eight one-ounce bags of a white substance he believed was cocaine, making a partial payment for the substance (Tr. 153-161). He sold part of the substance to an individual who never paid him for it (Tr. 167, 211) and, after being arrested, directed his wife to dispose of the remainder by washing it down the sink (Tr. 167, 211-213).

On January 25, 1980, a federal search warrant was executed on safe deposit box number 183 at the Canandaigua National Bank and Trust Company, Honeoye, New York. The search warrant was issued by a United States District

---

[1]McNamee and Scott were fugitives at the time of trial. Tantalo pleaded guilty to a misdemeanor charge and testified for the government.

Judge upon the application and affidavit of a DEA special agent. The affidavit was based upon detailed information received from two informants who had previously supplied reliable information to the government (A. 11-18).[2] The warrant authorized the seizure of "cocaine, dilutants [*sic*] such as mannitol and other sugars used to dilute cocaine, and sums of money which are evidence of the distribution and possession with intent to distribute of cocaine and other controlled substances" (A. 11). $67,524 in United States currency, along with jewelry and hundreds of coins (including gold krugerands, gold mexican pesos and United States gold typesets) were seized from the box. The safe deposit box also contained personal papers bearing petitioner's name (A. 12-14, 139-143).

ARGUMENT

1. Petitioner contends (Pet. 9-10) that the trial court erred in quashing subpoenas directed to the Federal Bureau of Investigation and the Drug Enforcement Administration requesting all documents relating to co-defendant Tantalo, who testified as a government witness after pleading guilty to a misdemeanor charge. Petitioner asserts that the trial court should have conducted an in camera review of this material, claiming that the government may have concealed evidence of Tantalo's perjury at another trial and may have knowingly presented false testimony during Tantalo's direct testimony at petitioner's trial. The court below properly rejected this argument.

On January 23, 1981, petitioner served subpoenas on the FBI and DEA requesting production of "[a]ny and all forms, reports, surveillance notes, intercepted telephone communications, memoranda, correspondence, and the like of or relating to or about Albert Tantalo" (A. 86, 87).

---

[2] "A." refers to the appendix filed with the court of appeals.

The following day the government moved for an order quashing the subpoenas on the grounds that the subpoenaed material was (1) beyond the scope of the Jencks Act, 18 U.S.C. 3500, (2) beyond the scope of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and (3) not properly disclosable because it was relevant to other criminal investigations or prosecutions and irrelevant to this case (A. 81-82). The affidavit attached to the motion averred that any and all statements of Tantalo relating to the subject matter of his testimony would be disclosed to defense counsel, as required by 18 U.S.C. 3500(b), and that all favorable or exculpatory *Brady* material had already been provided petitioner, including "an enumeration of those bad acts which Mr. Tantalo has disclosed to the government during the period of his cooperation and which can be used to impeach him at the time of trial" (A. 82). Finally, the affidavit noted that literal enforcement of the subpoenas would disclose sensitive matters relating to ongoing narcotics investigations in which Tantalo was involved as a witness or informant (*ibid.*).

Argument on the government's motion to quash was heard on January 27, 1981, prior to the commencement of trial. Counsel for petitioner contended that a certain police report had been given the FBI regarding Tantalo's drug dealings, and that this report should have been provided petitioner under *Brady* and was within the reach of the subpoena (A. 108-109). Counsel for petitioner requested that the trial court review the report in camera (*ibid.*). A copy of the disputed police report was produced for the trial court by the government, and after in camera examination of the document, the court granted the government's motion to quash the subpoenas on January 28.

On the afternoon of January 29, 1981, after the government had rested its case, counsel for petitioner produced an affidavit of Rich Loveland to support a motion for acquittal

(Tr. 409-410). On the basis of this affidavit, petitioner now claims that the trial court erred in quashing the subpoenas directed to the FBI and DEA.[3]

Contrary to petitioner's assertion (Pet. 9), he was not entitled to have the trial court conduct a general in camera search of the files of the FBI and DEA. During argument on the government's motion to quash, counsel for petitioner specifically mentioned one allegedly relevant police report that he believed would be produced pursuant to a subpoena (A. 109). That report was produced by the government and inspected in camera by the court before it granted the government's motion to quash (A. 98). At the time the government's motion was granted, petitioner had not identified any other material for in camera review. The government, on the other hand, had produced an affidavit stating that all *Brady* material and all statements in its possession pertaining to Tantalo's dealings with petitioner had been provided defense counsel (A. 81-82). The trial court, therefore, was fully justified in accepting these representations and quashing petitioner's subpoenas without undertaking the substantial burden of itself inspecting all the government's files.

2. Petitioner contends (Pet. i-ii) that the application for a warrant to search the safe deposit box at the Canandaigua Bank was deficient. He argues that the application was not

---

[3]As part of his direct examination, Tantalo admitted his involvement in a scheme to strip automobiles so that their owners could file false theft claims. Tantalo stated that he had stripped about ten automobiles during the life of the scheme. He had earlier given the same testimony at another trial. The Loveland affidavit, which forms the basis for petitioner's present claim, asserts that hundreds of automobiles were involved in the stripping scheme (A. 106). The trial court summarily denied petitioner's motion for acquittal based on the Loveland affidavit, without argument by counsel (Tr. 410). It is of course clear that even if petitioner had established that his conviction was infected by false testimony, the remedy would be a new trial and not an acquittal.

based on information from reliable informants and failed to furnish reasonable cause to believe that the items to be seized would be found in the safe deposit box (Pet. 11). This contention has no merit.

The affidavit by the DEA agent supporting the search warrant application averred that one of the informants had provided reliable information leading to indictments and convictions in other districts for the distribution of controlled substances. This informant had known petitioner for a number of years and claimed to be familiar with his cocaine distribution activities. The informant alleged that petitioner used safe deposit boxes for storing currency, cocaine and diluent, and that he had been in petitioner's company when safe deposit boxes were so used. The informant stated that petitioner used a large safe deposit box at the Canandaigua National Bank and Trust Company in Honeoye (A. 16). The DEA affidavit further asserted that a second informant had supplied information proven to be reliable through independent sources. This informant had known petitioner for two years, was familiar with his cocaine distribution, and on one occasion had received a half pound and on another occasion a quarter pound of cocaine from petitioner for distribution. According to this informant, petitioner distributed approximately two kilos of cocaine every two or three weeks at a profit of approximately $25,000 per kilo, and used safe deposit boxes in Honeoye, New York and Fort Lauderdale, Florida to store cocaine and large sums of money (A. 17). Finally, the DEA affidavit set forth the fact that petitioner had been identified as a user of the box at the Canandaigua National Bank, and that it was the agent's experience that narcotics dealers conduct business using large amounts of cash (A. 17-18). These facts were clearly sufficient for the magistrate to make an independent determination that the informants

were credible and their information reliable. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).[4]

3. A sealed indictment against petitioner and his co-defendants was returned on March 5, 1980. The indictment was unsealed and petitioner was arraigned on April 14, 1980. On July 7, 1980, the government filed its motion to set a trial date, and a week later the court—without objection from petitioner—set a trial date of December 1, 1980, the first available trial date on its calendar. At the time the trial date was being set, a criminal civil rights trial that was estimated to take six to eight weeks to try was already scheduled, and two other criminal cases were scheduled to begin after the civil rights case. The court accordingly scheduled the latter two cases for the middle of November, and this case for December 1. Ultimately, the civil rights case lasted until December 21, 1980. Petitioner's trial began on January 27, 1981.

There is no merit to petitioner's claim (Pet. 11-12) that his speedy trial rights require dismissal under the Speedy Trial Act of 1974 or the Constitution. The statute, 18 U.S.C. 3162(2), provides that the defendant shall have the initial burden of showing that he was not brought to trial within the time limits set by the Act. Here, as the court below found, petitioner never attempted to allege or demonstrate that his prosecution was not in compliance with the time constraints of the Act (Pet. App. A-2). In any event, since the indictment was returned on March 5, 1980, the sanctions of the Speedy Trial Act of 1974 were not applicable to petitioner's prosecution. 18 U.S.C. 3163(c).

---

[4]Unlike *Illinois* v. *Gates*, cert. granted, No. 81-430 (Jan. 11, 1982), the informants here were known individuals who had previously given information in the past that had proven to be reliable.

Apart from the Speedy Trial Act of 1974, dismissal is not required by any constitutional speedy trial considerations. Petitioner acquiesced in the original December 1 trial date. That trial date was postponed a few weeks because a criminal case then being tried before the district court took longer than anticipated. Petitioner did not object to the rescheduling of the December trial date. Petitioner, furthermore, has not pointed to any specific prejudice arising from this delay, and in the circumstances of this case the delay "was reasonable * * * and therefore not in violation of the Sixth Amendment to the Constitution" (Pet. App. A-2). See *Barker* v. *Wingo*, 407 U.S. 514 (1972).

4. Petitioner asserts that the trial court improperly impeached Tantalo concerning matters favorable to petitioner (Pet. 10). He offers, however, no specifications. As the court of appeals correctly held (Pet. App. A-3), the trial court's questions to Tantalo were designed to elicit information from the witness, and did not convey bias against petitioner. Similarly, contrary to the summary argument of petitioner (Pet. 10-11), the court of appeals found that the trial court marshalled the evidence in a fair and unbiased fashion, and incorporated in its jury instructions the substance of all charges to which petitioner was entitled (Pet. App. A-3). This fact-bound holding of the court of appeals does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

MARCH 1982

DOJ-1982-03